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Supreme Court, U.S.
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No. 97-537

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

1. Respondent does not dispute that the courts of appeals are in conflict concerning the appealability of a district court decision remanding a final decision of a bankruptcy court. Respondent also does not dispute that Petitioner accurately described this "jurisdictional quagmire"[1] and that this issue is recurring. Since the Petition was filed, the Sixth Circuit decided *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), No. 96-6400, 1997 WL 654252 (6th Cir. Oct. 23, 1997), which reiterates that Circuit's commitment to the position adopted in *SEOR, Inc. v. Textron Oil Corp.* (*In re Frederick Petroleum Corp.*), 912 F.2d 850 (6th Cir. 1990).

2. Respondent also does not seriously dispute Petitioner's showing that the minority rule circuits would have held that the district court's decision below was final and thus would have asserted jurisdiction.[2] Instead, many of Respondent's arguments are addressed to the majority approach's purported comparative virtues. For example, she asserts that, under the minority standard, jurisdiction turns on a determination of the merits. Opp. at 9-10. But just because the minority courts may determine their jurisdiction by looking to whether the legal issues presented are potentially dispositive, they need not first resolve those issues.[3]

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[1] Preston T. Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. 587, 588 (1988).

[2] Respondent asserts that there are outstanding issues other than the one that Petitioner seeks to appeal: his intent in valuing his medical practice. *See* Opp. at 4 & n.3, 10 n.7. So, she says, Petitioner's appeal would not be potentially dispositive. But the district court found that "all of [Respondent's assignments of error] are without merit except for the issue relating to valuation of the medical corporation." Pet. App. 15a. This Petition thus presents a model case for determining the proper finality standard.

[3] *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co.* (*In re Bonner Mall Partnership*), 2 F.3d 899, 904 n.13 (9th Cir. 1993), *cert. dismissed*, 513 U.S. 18 (1994).

3. Respondent primarily opposes certiorari on three grounds: (1) this Court's five-year-old decision in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), may resolve the circuit split; (2) Petitioner could have sought a permissive interlocutory appeal under 28 U.S.C. § 1292(b); and (3) the Court can resolve this conflict by its rulemaking authority under 28 U.S.C. §§ 1292(e) and 2072(c). None supports denying certiorari.

4. Contrary to Respondent's claim, this Court's decision in *Germain* does not "cast[ ] doubt on the continued validity of the various minority approaches to appellate jurisdiction in bankruptcy matters." Opp. at 7-8. In *Germain*, this Court held that 28 U.S.C. § 1292(b) permits interlocutory appeals in bankruptcy cases;[4] this Court did not address the finality standard under 28 U.S.C. § 158(d). Consequently, both majority rule and minority rule courts have recognized that *Germain* does not address the standard for finality.[5] Every minority rule court has continued to apply its standard following *Germain*.[6] As Chief

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[4] *Quiros Lopez v. Unanue Casal (In re Unanue Casal)*, 998 F.2d 28 (1st Cir. 1993), *cited in* Opp. at 8-9, cited *Germain* only for this uncontested point and is an unexceptional application of the majority standard.

[5] For majority rule courts, see *In re Gould*, 977 F.2d 1038, 1041 n.2 (7th Cir. 1992); *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1004-05 (10th Cir. 1992); and for minority rule courts, see *In re Bonner Mall Partnership*, 2 F.3d at 904 n.11, and see also *United States v. TWA (In re TWA)*, 18 F.3d 208, 215 (3d Cir. 1994). Despite dicta in *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.)*, 81 F.3d 103 (9th Cir. 1996), *cited in* Opp. at 8, the Ninth Circuit has indicated that "nothing in *Germain* casts doubt upon the" minority's flexible finality standard, *In re Bonner Mall Partnership*, 2 F.3d at 904 n.11. *See Foothill Capital Corp. v. Clare's Food Market (In re Coupon Clearing Serv.)*, 113 F.3d 1091, 1098-99 (9th Cir. 1997) (continuing to apply minority standard).

[6] *See, e.g., id.*; *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1287-88 (8th Cir. 1997); *Hammond v. Commonwealth Mortgage Corp. (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994).

Judge Posner said, this is "a persistent circuit split that only the Supreme Court can heal." Pet. App. 1a.

5. Respondent claims that, because permissive interlocutory appeals are available, the practical differences in the majority and minority positions are blurred, and the circuit split need not be resolved. Opp. at 11. But Respondent ignores the significant differences between final and interlocutory decisions that make it crucial for this Court to clarify the finality standard under 28 U.S.C. § 158(d). Final orders are appealable as of right.[7] On the other hand, interlocutory appeals are discretionary, both for the district court in certifying an appeal and the court of appeals in granting it. Interlocutory appeals are reserved for "exceptional" cases, and the court of appeals can reject them — even if they meet Section 1292(b)'s minimum standards — for any reason including docket congestion.[8] Thus, under the minority rule, Petitioner would have been able to appeal the district court's remand as of right, while, in the Seventh Circuit, he would have borne the burden to show exceptional reasons for an appeal. This difference among the circuits as to appeals as of right is significant to bankruptcy litigants and destroys the desirable and salutary uniformity in bankruptcy procedures.

6. This Court's claimed ability to resolve this split through its rulemaking authority does not support denial of certiorari. First, it is unclear whether Congress has granted the Court rulemaking authority to define the concept of finality in bankruptcy appeals under 28 U.S.C. § 158(d). Title 28 U.S.C. § 1292(e) empowers the Court to make rules about interlocutory appeals, not about finality, and, by its terms, 28 U.S.C. § 2072(c) grants the Court authority to define finality only for general appellate jurisdiction under 28 U.S.C. § 1291. Second, to our knowledge, there are currently no relevant proposed rules under either 28 U.S.C.

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[7] *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994).

[8] *See id.* at 883 n.9; *Caterpillar Inc. v. Lewis*, 117 S. Ct. 467, 475 (1996).

§§ 1292(e) or 2072(c), and the Court should not adopt Respondent's suggestion and perpetuate this circuit split until the appropriate Advisory Committee decides to act. Under Respondent's logic, the Court would never take a case concerning the rules of evidence or civil, criminal or bankruptcy procedure; it would just fix every problem prospectively by proposing amendments to the rules for Congress's consideration.

7. To the extent that Respondent contends that this circuit split need not be resolved, Opp. at 7, she ignores the position of numerous commentators, including Judge Edith Jones, that this is a divisive issue,[9] and that it "undermines the entire bankruptcy process."[10] Petitioner respectfully submits that this Court should accept Chief Judge Posner's invitation to address a persistent circuit split that only it can heal. Pet. App. 1a.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] *Bankruptcy Appeals*, 16 T. Marshall L. Rev. 245, 255 (1991); *see* Pet. at 8 n.5.

[10] Towber, 29 S. Tex. L. Rev. at 590.